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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Can the ICC properly sanction as just and reasonable a tariff rule which permits one carrier to collect charges for services performed by another?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners State of South Carolina, South Carolina Public Railways Commission, and The American Short Line Railroad Association respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this proceeding on June 30, 1982.[1]

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[1] Respondents, in addition to the Interstate Commerce Commission, are the United States, The Seaboard Coast Line Railroad Company and the Southern Railway Company.

OPINIONS BELOW

The decisions of the Administrative Law Judge and the Review Board which were reversed by the Interstate Commerce Commission, both of which are unpublished, are attached as Appendices A and B, respectively. The decision of the Interstate Commerce Commission, which is reported at 365 I.C.C. 274, is attached as Appendix C. The opinion of the U.S. Court of Appeals, which is unpublished, is attached as Appendix D. The notice of judgment of the U.S. Court of Appeals, which is unpublished, is attached as Appendix E.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 30, 1982 and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Revised Interstate Commerce Act are attached as Appendix F to this petition.

STATEMENT OF THE CASE

A. The Nature of the Controversy

South Carolina Public Railways Commission ("SCPRC"), an agency of the State of South Carolina, owns and operates terminal railroads that provide essential transportation services in furtherance of the flow of commerce in and through the State. Among the railroads operated by SCPRC is the Port Terminal Railroad of

South Carolina ("PTSC"), a small Class III common carrier which serves various industries at the port of North Charleston, SC including a grain elevator operated by the South Carolina Farm Bureau Cooperative Association ("Farm Bureau"). Rail cars of grain are transported to North Charleston by Seaboard Coast Line Railroad Company ("SCL") and Southern Railway Company ("SRC"), the Class I line-haul rail carriers who serve the port by interchange with the PTSC. The lines of those two carriers do not reach the Farm Bureau elevator. Therefore, they interchange the cars with PTSC whose lines do reach the elevator, and PTSC delivers the cars to the elevator for unloading.

Frequently, the elevator is unable to accept all of the cars as they are delivered to it for unloading. When that occurs, the cars are held on the lines of PTSC until the elevator can accept them. In order to provide such holding service PTSC must have available sufficient trackage and maintain it in accordance with applicable Federal safety standards. PTSC also provides security for the cars and their contents, maintains records necessary to accurately determine the demurrage charges which accrue while the cars are being held for unloading by the elevator, and provides all of the extra switching that is necessitated by the congestion resulting from the holding of the cars.

PTSC has traditionally covered the costs of performing these services with the demurrage charges collected from the Farm Bureau. However, in 1977 SCL and SRC caused to have published a tariff revision providing that demurrage charges accruing on cars being held by PTSC on its lines would thereafter accrue to SCL and SRC notwithstanding the fact that the services which generate those charges would of necessity continue to be performed by PTSC. Neither SCL nor SRC undertook to provide any

new or additional service to justify the tariff revision. All physical operations remained as they had been and PTSC continued to hold the incoming cars on its lines, to provide all services and to perform all functions in connection with the holding of such cars and to bear the entire cost of providing such services and performing such functions. In effect, the tariff revision created a situation whereby one carrier collects charges for services provided by another and the carrier actually providing the services is denied charges attributable to those services and collects nothing.

B. The Proceedings Below

PTSC asked to have the tariff revision suspended pursuant to 49 U.S.C. § 10707 but the ICC exercised its discretion not to suspend and the revision became effective on August 6, 1977.

After unsuccessfully attempting to resolve the matter through negotiations with SCL and SRC, SCPRC, on May 4, 1978, filed a petition for declaratory order with the ICC pursuant to 5 U.S.C. § 554(e). In that petition, which was docketed as No. 36927, *South Carolina Public Railways Commission Petition For Declaratory Order-Assessment and Collection Of Demurrage Charges,* SCPRC requested the ICC to institute a proceeding for the reception of evidence and issuance of a decision determining the applicability and lawfulness of the tariff provision. On May 14, 1979, after an entire year of deliberation, the ICC by a divided decision of its Division 1, declined to exercise its discretion to institute a declaratory order proceeding. An appeal was promptly filed and, on November 28, 1979, the ICC, again by a divided vote of Division 1, denied the appeal.

In its decision refusing to institute a declaratory proceeding the ICC advised SCPRC that its proper remedy was to file a formal complaint. On December 18, 1979, SCPRC filed such a complaint. The parties filed evidence and legal arguments pursuant to a schedule established by the ICC and on June 24, 1980, an Administrative Law Judge issued an Initial Decision finding Item 380(F) to be unjust and unreasonable and ordering that it be cancelled. SCL and SRC jointly filed an Administrative Appeal to the Initial Decision, to which SCPRC replied and on January 6, 1981 the ICC served a Decision of Review Board No. 4 unanimously affirming the Initial Decision and directing that the offensive tariff provision be cancelled. On January 26, 1981, SCL and SRC filed a pleading styled as a Petition for Administrative Review and Stay of Decision to which SCPRC responded. By order served February 4, 1981, the Commission denied the request for stay of its decision but did not act on the request for administrative review.

Thereafter, SCL and SRC filed a petition with the U.S. Court of Appeals for the Fourth Circuit seeking judicial review of the unanimous Review Board Decision of January 4, 1981. That petition was docketed by the Court fo Appeals as No. 81-1146, *Seaboard Coast Line Railroad Company, et al v. Interstate Commerce Commission, et al.* The Court granted an *ex parte* motion by SCL and SRC for a temporary stay of the Commission's Order but the stay was later vacated and the motion of SCL and SRC for an interlocutory injunction *pendente lite* was denied following briefing and argument. The Court established an expedited briefing schedule pursuant to which an opening brief was filed by SCL and SRC to which South Carolina and SCPRC, intervenors in No. 81-1146, responded.

On May 14, 1981, in the midst of the briefing schedule, the ICC advised the Court that on May 11, 1981 it had decided that the disputed tariff provision involved a matter of general transportation importance and had reopened the case for further proceedings. Based on those developments the ICC requested an order holding proceedings before the Court in abeyance pending further ICC action. The Court granted that motion and on September 8, 1981 the ICC issued the decision which is attached hereto as Appendix C.

On September 22, 1981 South Carolina and SCPRC filed a petition with the U.S. Court of Appeals for the Fourth Circuit seeking judicial review of the ICC decision. After briefing and argument the Court of Appeals issued the decision which is attached hereto as Appendix D.

REASONS FOR GRANTING THE WRIT

The decision of the ICC which was affirmed by the Court below represents a radical departure from long-established precedent and, if permitted to stand, will serve as an invitation for large and powerful carriers throughout the nation to demand payment for services performed by short line and terminal carriers. Such practices will spread rapidly throughout the country and undermine the viability of short line and terminal carriers who will be without regulatory protection to safeguard their right to the charges which accrue for the services that they perform.

Until the decision which is here in issue, the ICC had consistently held that demurrage charges are properly collectable by the carrier on whose lines the charges accrue, i.e., the carrier on whose lines cars are held for loading or unloading in excess of free time at the request of the ship-

per or consignee. Indeed, even in the instant decision the ICC acknowledged that well-established rule as follows:

> We have frequently stated that demurrage is both assessed and retained by the carrier on whose line the detention occurs. See, e.g., *Demurrage Rules and Charges, Nationwide,* 340 I.C.C. 83, 92 (1971). When detention occurs at the end of a multi-carrier movement the delivering carrier traditionally collects and retains all demurrage payments. *Remittance of Demurrage Charges,* 353 I.C.C. 567, 589 (1977); *Baltimore & O.C.T.R. Co. v. United States,* 583 F.2d 678, 681 n. 3 (3rd Cir. 1978). *cert. denied,* 440 U.S. 968 (1978). These general principles reflect the underlying rationale that the carrier who incurs the costs associated with the detention of cars should be compensated by demurrage. See, *Union Belt of Detroit Pooling of Revenue,* 201 I.C.C. 577, 580 (1934).

South Carolina Railways Commission v. Seaboard Coast Line Railroad, 365 I.C.C. 274, 277 (1981).

The policy embodied in the cases cited by the ICC is firmly grounded in both specific statutory mandate and conventional common sense. Congress has expressly commanded the ICC to establish and maintain rules relating to the collection of demurrage which encourage an adequate supply of freight cars and their efficient utilization and distribution. 49 U.S.C. § 10750. In announcing the new rule the line-haul carriers represented that its purpose was to improve car utilization. However, in the proceedings before the ICC, it was shown that after the tariff revision embodying the new rule became effective the line haul carriers eventually were forced to liberalize demurrage regulations applicable to cars held by PTSC because they were

unable to comply with the provisions of their own tariff as they were incapable of effectively administering those provisions without first hand knowledge of the actual date and time of placement and release of cars. This liberalization of the applicable rules had the effect of wholesale relaxation of the incentive for prompt release of the cars. This, of course, is precisely the opposite of the purported justification asserted by the line-haul carriers for the new rule and precisely the opposite of the result intended by Congress in enacting the provisions of 49 U.S.C. § 10750. The ICC inexplicably chose to ignore this pivotal consideration in its reversal of the prior decisions of the Administrative Law Judge and the Review Board.

The deterioration in car utilization, as a result of the new rule sanctioned by the ICC, is not surprising in that the rule places responsibility for enforcement of demurrage regulations in the hands of carriers who, because they are removed from the site at which cars are held for unloading, have no knowledge as to precisely when the cars are tendered to the ultimate consignee for unloading or when the consignee releases the empty cars. At the same time the new rule denies the terminal carrier both the wherewithall and the incentive to administer the demurrage rules. Thus, the Commission has created a situation in which the carrier that has the financial incentive to assess demurrage charges is without the capability of properly calculating them and the carrier that has the capability to properly calculate them has been denied the resources with which to do so.

The problems inherent in such an irrational arrangement are so obvious that even the ICC, prior to the instant case, had recognized the fundamental soundness of having charges for transportation services payable to the carrier that actually provides the services. See, for example, *Kan-*

sas City Power & Light Co. v. Kansas City Southern, 361 I.C.C. 848, 851 (1979), in which the ICC flatly stated that one railroad may not properly charge a shipper for a service performed by another railroad.

In the present decision, which has been sustained by the Court of Appeals with perfunctory deference to agency expertise, the ICC has departed without any adequate justification from its previous policy of long standing and the decisions of the Administrative Law Judge and Review Board which were rendered in consonance with that policy. As was explained by this Court in *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade,* 412 U.S. 800, 807-08 (1973):

> A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms.

Here there simply is no adequate explanation for the Commission's abdication of its long-recognized responsibility to require demurrage practices which encourage efficient car utilization.

The ICC apparently recognized the unassailable logic of the decisions of its Administrative Law Judge and Review Board which rejected as fundamentally inequitable and unworkable a tariff rule providing that one carrier should collect for work performed by another. Because it could not justify such a situation, the ICC avoided dealing with it by conjuring a novel theory of agency which had never been asserted or even suggested by any of the parties.

Essentially, the ICC determined that PTSC does not act as a carrier in its own right but merely as an agent for the line-haul carriers and that the line-haul carriers are the "delivering" carriers for the purpose of determining who is entitled to collect demurrage. This analysis, to which the parties never had an opportunity to respond since it first surfaced in the ICC's final decision, is simply not consistent with the realities of the situation. It ignores, for example, that PTSC is an independent common carrier which provides service pursuant to its own certificate of public convenience and necessity rather than under the aegis of some other carrier. It ignores the fact that PTSC is a party in its own right to tariffs applicable to the involved traffic. It ignores the fact that shippers served by PTSC are directly liable to PTSC for unabsorbed switching charges as to which the purported "principals" have no right or interest. It ignores the fact that only PTSC can physically serve the industries located on its lines and does so as an independent carrier with full rights and obligations as such.

The case principally relied upon by the ICC as the basis for its agency theory not only fails to support the ICC's reasoning but actually demonstrates its invalidity. That case, *Missouri Pacific Railroad Co. v. Reynolds-Davis Grocery Co.*, 268 U.S. 366 (1925), relates exclusively to liability for cargo loss or damage pursuant to specific statutory provisions dealing with that subject. It has absolutely nothing to do with the relationship between connecting carriers with regard to their rights to collect and retain charges for services performed on their respective lines which has traditionally been recognized as a connecting carrier relationship rather than a principal-agent relationship.[2] The fact that there is no correlation between

[2]The Commission has frequently held that the relationship that exists between terminal and line-haul carriers with which they interchange traffic is a connecting carrier relationship insofar as the shipp-

a line-haul carrier's status as a "delivering" carrier in terms of liability and its status as a "delivering" carrier in terms of physical operations is underscored by the fact that its "delivering" carrier status for liability purposes is the product of an express statutory provision. Specifically, 49 U.S.C. § 11707(a)(1) provides in pertinent part that:

> A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

The fact that Congress felt compelled to enact this language demonstrates that, in its absence, there would be no basis for concluding that the "delivering" carrier (even for liability purposes) is other than the carrier actually effecting physical delivery of the lading. There is, of course, no equivalent provision establishing the legal fiction of the inbound line-haul carrier as the "delivering" carrier for any purpose other than shipper liability.[3] The fact that the provisions of 49 U.S.C. § 11707(a)(1) (original version at 49 U.S.C. § 20(11) (1951)), have no bearing on the right of a terminal carrier to assess and collect charges for service on its own lines has been recognized by the ICC.

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ing public is concerned, i.e., "so far as the public is concerned, the effect of a switching absorption is to establish a joint rate." *Switching Absorptions*, 47 I.C.C. 583 (1917); *Switching Grain in St. Louis Dist.*, 232 I.C.C. 459, 461 (1939); *Reciprocal Switching Richmond Va.*, 306 I.C.C. 97, 103 (1959).

[3]Aids to statutory construction such as the maxim *Expressio unis est exclusio alterius* compel a conclusion that where, as here, the treatment afforded to intercarrier relationships for purposes of liability to shippers contrast sharply with an absence of similar action with respect to other aspects of intercarrier relationships, the lack of such action was deliberate and intentional. See 73 Am Jur 2d *Statutes* §§ 211-212 (1974). See also J.G. Sutherland, *Statutory Construction*, §§ 65.01-65.02 (4th Ed. 1972).

See *California Packing Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 204 I.C.C. 741, 744 (1934).

Another significant element contributing to the erroneous action of the ICC and, in turn, the Court of Appeals is the confusing insertion of the concept of per diem into a case involving the totally unrelated subject of demurrage. Per diem is a charge imposed by car owners as compensation for the use of their cars on the lines of other carriers. Car owners are clearly entitled to such compensation and that right has never been questioned in this proceeding. Where the ICC and, in turn, the Court of Appeals became confused, however, is in its attempt to suggest that the per diem reclaim agreement between PTSC and its line-haul connections somehow has a bearing on the right of PTSC to collect demurrage charges from the shipper who uses the tracks of PTSC for the storage of rail cars employed in its service.

Contrary to the misunderstanding reflected in the opinion of the Court of Appeals, per diem reclaim is not an unusual or special concession but a common, industry-wide practice. The per diem reclaim agreement between PTSC and its trunk line connections is governed by Rule 5 of the Car Hire Rules of the Association of American Railroads. Those rules, which are sanctioned by the ICC, constitute a contract of adhesion published by the line-haul carriers. Per diem reclaim is a recognition of the gross inadequacy of switching absorptions and is intended as supplemental compensation to the switching carriers in order to reduce the volume of paper work and circular flow of funds between the line-haul carriers and the switching carriers. If per diem reclaim was not provided, the switching lines would have to pay per diem to their line-haul connections and then assess increased charges for performance of switching services. Per diem reclaim has

developed as the custom of the trade in order to reduce these offsetting payments and their attendant paperwork burden.

What is important in the context of this case is the fact that PTSC's entitlement to per diem reclaim existed long before the publication of the tariff provision which is at issue in this proceeding. Thus, PTSC's entitlement to per diem reclaim is totally unrelated to and in no way contingent upon its right to assess and collect demurrage charges accruing on cars held on its own lines.[4]

Equally important is the fact that, contrary to the Commission's conclusion, the per diem reclaim agreement to which PTSC is a party does *not* completely relieve it of responsibility for all per diem costs. Rather, it provides, consistent with the provisions of Rule 5 of the AAR Car Hire Rules, that per diem may be relieved only up to an average of 120 hours (i.e., five days) per car.[5] Thus, if a shipper should choose to hold cars on demurrage for more than an average of five days, PTSC will now be obligated to pay per diem on those cars for the excess days but will not be able to collect any demurrage on those cars.

How long cars stay on demurrage is, of course, a matter completely within the discretion of the shipper. If the shipper is willing to pay applicable demurrage charges, it may

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[4]The total lack of any such relationship is also evidenced by the fact that PTSC still collects demurrage on all cars other than those containing grain although those other cars are subject to per diem reclaim to precisely the same extent as the grain cars.

[5]The five days reclaim period includes Saturday, Sundays and holidays even though demurrage is not assessed on those days. Thus, the per diem reclaim period can expire before a shipper has incurred significant demurrage charges.

hold cars indefinitely.[6] After the expiration of reclaim, PTSC will become liable to the car owners for per diem on those cars but will have collected no demurrage charges from which to make those payments. Instead, the demurrage charges will have been collected by SCL or SRC. In those instances where the cars are owned by SCL or SRC such revenue will be collected by them *in addition to* per diem paid by PTSC. In those instances where SCL or SRC are not the car owners the demurrage revenues will represent a complete windfall for which they have performed no service nor borne any ownership burdens. This is a situation which is totally alien to the heretofore carefully balanced relationship between connecting carriers. It is a situation which the ICC obviously failed to recognize in its arbitrary determination to overrule the carefully considered decisions of the Administrative Law Judge and the Review Board.

Further insight into the defective reasoning which spawned the decisions below is provided by the suggestion expressed in the ICC decision and echoed in the decision of the Court of Appeals that, to the extent that denial of demurrage to PTSC for services performed by it in the holding of cars results in a revenue shortfall, PTSC can make up for it by increasing its switching charges. Such a practice would require PTSC to impose upon shippers who release cars promptly the burden of underwriting a share of costs attributable to holding of cars for shippers who operate with less efficiency. Such an arrangement would be the very antithesis of the concept of just, reasonable and non-discriminatory treatment of shippers

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[6]Use of rail cars for temporary grain storage is not an unusual practice, particularly at export facilities such as those served by PTSC where grain must be accumulated in sufficient quantities to fill large vessels.

which is the very foundation of the Interstate Commerce Act.

The new policy reflected in the ICC's decision is particularly unfortunate because it will serve only to encourage practices which inure to the detriment of small railroads and shippers who are without sufficient economic leverage to protect themselves from the exaction of charges for which no service is performed. It is not by happenstance that the proponents of the tariff provision which is here at issue are two of the largest and most powerful railroads in the nation and that the targets are a small common carrier and a small shipper with a single facility that has no feasible alternative to the line-haul services of SCL and SRC. Without the regulatory protection heretofore available from the ICC, small carriers such as PTSC will be powerless to resist publication by large, line-haul carriers of tariffs providing for collection by them of charges attributable to services performed by the small carriers.

Furthermore, notwithstanding the loss of charges heretofore paid to them, the terminal lines will have no choice but to continue to absorb the cost of providing and maintaining trackage sufficient for holding cars consigned to the industries that they serve. The alternative would be to handicap the ability of those industries to function and to generate traffic which the terminal carriers depend upon for their survival. The cost of maintaining adequate trackage for holding of cars and providing additional switching necessitated by the congestion which is created when cars are held on demurrage will have to be paid from some source and that source ultimately will be the shippers served by the terminal carriers. This will necessarily create a situation in which the shippers will pay twice for the same facilities and services. They will pay once to the line-haul

carriers for doing nothing and once to the terminal carriers to compensate them for the costs incurred in providing the terminal facilities and services essential to the efficient handling of their traffic.

The decisions of the ICC and the Court of Appeals do not reflect any meaningful recognition or consideration of the full impact of the new rule which the ICC has sanctioned. The ICC, in an effort to explain its abrupt departure from long-established precedent and from the decisions of its Administrative Law Judge and its Review Board, acknowledged that this case presents an issue of general transportation importance. However, it then proceeded with a parochial analysis which reflects an assumption that the impact of the new rule will be limited to one terminal and one grain elevator.[7] Nowhere is there apparent recognition that approval of the new rule will inevitably lead to line-haul carriers subjecting terminal carriers nationwide to the same provisions until the situation becomes intolerable and forces terminal carriers out of business and undermines the intricate structure of the national rail transportation system in which terminal carriers fulfill a vital role.[8]

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[7]SCL and SRC presumably limited the initial applicability of their new rule to one commodity (i.e., grain) in order to encourage the ICC to take just such a limited view which ignores the fact that the precedent established in the context of this proceeding, if permitted to remain in effect, will serve as a license for large and powerful carriers to subject small and defenseless terminal carriers throughout the country to the same practice with respect to cars handling all types of commodities.

[8]The wide ranging significance of the ultimate outcome of this controversy is evidenced by the participation of The American Short Line Railroad Association on behalf of a nationwide membership of hundreds of carriers who are potential targets of the same predatory practice which is here in issue.

Adequate explanation of the ICC's acquiescence in such intolerable burdens on the free flow of commerce cannot be found in its decision. Rather, it seems apparent that the ICC's motivation in abandoning its responsibility to safeguard small carriers and shippers from abusive, selective tariff practices was to demonstrate the existence of a *laissez faire* transportation regulatory environment which it apparently believes to be mandated by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1926 (1980), ("Staggers Act"). However, such a posture is squarely at odds with one of the principal legislative objectives of the Staggers Act. The legislative history of the Staggers Act[9] makes clear that in drafting its provisions:

> ". . . special attention [was given] to insuring that the new regulatory freedoms will not be used to stifle the development of our smaller class II and class III carriers which are an important element, and a growing element, in the national rail network."

and that:

> ". . . it is our intent to promote development of class II and class III carriers and other sections of this legislation are not to be used by the Interstate Commerce Commission or any other entity in a fashion that intends an adverse impact on one or more class II or class III carriers."

and that:

> "Simply put, we do not intend that the various sections of this legislation be used so that the expanded power and flexibility given large carriers

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[9]126 Cong. Rec. H8552-55 (daily ed. Sept. 9, 1980) (statement of Rep. Lee).

> can be applied against class II and class III carriers in an adverse fashion that would impair a smaller carrier's ability to attain financial health."

This is the first case of major national significance (or of "general transportation importance" in the terminology employed by the ICC) which reflects such a clearly misguided reaction to the Staggers Act as it relates to the rights and interests of smaller carriers. As such it provides the court with a unique opportunity to remind the ICC that Congress has neither directed nor authorized it to abdicate its responsibilities to safeguard small carriers and shippers from oppressive actions of huge and powerful line-haul carriers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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